Office - Supreme Court, U. S.
FILED
MAR 5 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940
No. 629

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased,
PETITIONER,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY, a corporation,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF OF RESPONDENT

HADLOND P. THOMAS,
DANIEL H. THOMAS,
Salt Lake City, Utah,
Counsel for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1940
No. 629

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased,

PETITIONER,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY, a corporation,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF OF RESPONDENT

1.

STATEMENT

"The personal representative of a deceased farmer who desires in his representative capacity to effect, under section 75, a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition," . . . etc. General Order 50 (9). 11 U. S. C. A. (Sec. 53-100), 1940 Pocket Part, p. 38.

The Supreme Court of Utah denied petitioner, an administrator appointed by the state probate court, an order in probate to institute proceedings in federal court under Section 75 of the Bankruptcy Act; also denied him authority of the probate court to apply to the bankruptcy court to revive or reinstate a similar proceedings commenced in the lifetime of his intestate which, on her death, the bankruptcy court had ordered abated, and reversed the lower probate court's order which had assumed to authorize him to go about instituting new proceedings under Section 75 or reviving the former one, as advised. (R. 2). In re Harris' Estate, 105 P. (2d) 461.

Thus was petitioner denied by the state probate court, his creator, and so he now stands without, that which this court's General Order has lawfully ordained to be indispensable and prerequisite to an administrator's efforts before a federal court of bankruptcy and which must be exhibited there at the outset as part of his application and without which he may not enter,—"*an order of the probate court authorizing him to file the petition.*"

And so the matter rests. The administrator has been denied the authority he had sought of the probate court. Now he may not proceed in bankruptcy for the probate court has forbidden him, and while forbidden and until permitted, this court by its General Order says that he *may* not.

Cognizant of his incompetence before a bankruptcy court he therefore now calls upon this court to reverse the judgment and coerce the Supreme Court of Utah to yield in the construction of its own state law to a result which he would have imposed upon it. But as we shall see, the state court's order is conclusive.

2.

THE BASIS OF THE STATE COURT'S JUDGMENT WAS THE STATE PROBATE CODE

The administrator relies here as in the State Supreme Court wholly upon that part of Section 75 of the Bankruptcy Act, (subsection "r") which includes a deceased's farmer's administrator within the definition of a farmer:

> " (r) For the purposes of this section . . . the term 'farmer' . . . includes the personal representative of a deceased farmer." 11 U. S. C. A. Sec. 203 (r).

But by its General Order above, 50 (9), requiring administrators to first gain authority from their creators, the probate courts, this court recognized the supreme power of such courts over their creatures, administrators and executors. It thereby conceded them as incompetent in bankruptcy without such authority and rightly so for they are only the creatures of the court creating them, and no more, being officers of those courts and wholly subservient to their control and to the limitations of the applicable state statutes.

Now the denial here was not the product of a simple refusal by a probate court to yield consent to the administrator, although that alone by General Order 50 (9) should manifestly have put an end to further judicial inquiry. It was upon more solid ground as the opinion reveals. It was altogether upon the firm ground that state statutes comprising the Utah Probate Code, as herein construed by the State Supreme Court the final arbiter in such cases, do not permit administrators to shake off the jurisdiction of their creator, the probate court, and stray afield beyond its domain, neither do they allow that court to permit them to do so.

The power of Congress to define an administrator as a farmer was not explored. Only the authority of the State Probate Code was investigated and found to be wanting in the particular claimed. The highest state court having reached this result regarding a matter of state law, the controversy should end conclusively at this point. Neither administrator nor probate court being endowed by

the Utah Probate Code of the power sought, the inquiry should terminate.

The Utah Supreme Court said:

> "The question here is not whether the Frazier-Lemke Act permits the administrator of a deceased farmer to file a petition for debtor's relief under the moratorium provisions of the act, *but whether the Probate Court has the authority to authorize an administrator to file such a petition in the United States District Court.*"
>
> (Italics added). In re Harris' Estate, 105 P. (2d) 461.

Then recounting the necessity of state court consent as required by General Order 50 (9) the state court approached the problem of the administrator's authority and powers by investigating their source, finding it to be exclusively in the Probate Code:

> "The source of the administrator's power and that of the probate court must be found in the Probate Code. Nowhere in the Probate Code is there any power expressed authorizing an administrator to resort to the Frazier-Lemke Act or permitting the probate court to authorize him to do so. Federal courts have no jurisdiction in probate matters in respect to the administration of the estates of deceased persons. 2 Hughes Federal Practice, Jurisdiction and Procedure, Sec. 985."

Continuing, the court remarks:

> " 'Proceedings for the administration of estates of decedents are purely statutory.' 1 Bancroft's Probate Practice, p. 76, Sec. 37."

And that:

> "Jurisdiction of the Probate Courts to administer upon the estate of decedents is primary and *exclusive.* 1 Bancroft's Probate Practice, p. 62, Sec. 33." (Italics added).

Then of the origin and extent of the state probate court's powers, it is said:

> "'The court, sitting in probate, derives its power from the statutes and has *only* such powers as are granted by statute or reasonably implied or reasonably necessary and proper to effectuate the powers which are given." In re Cloward's Estate, 95 Utah 453, 82 P. (2d) 336, 339, 119 A. L. R. 123.
>
> "The problem presents the anomaly, if allowed, of a probate court *divesting* itself of the management of the estate and permitting its appointee who represents the interests of the heirs, if there are any heirs of the deceased, to be subjected to the jurisdiction of another tribunal." (Italics added).

Then of the administrator's status and limited right to the property the court adds:

> "The administrator is neither a debtor nor a bankrupt, and has only the control of the property for the purpose of pursuing the statutory probate proceedings in order that the heirs may receive what there is remaining after the expenses of administration have been paid and the claims of creditors have been satisfied." In re Harris Estate, 105 P. (2d) 461, 462.

And upon other considerations the Utah Supreme Court likewise finds herein that the administrator and probate court are powerless under the state code. It refers to Section 101-4-2 Revised Statutes of Utah 1933, which deals with descents of property of intestates and is as follows:

> "The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purpose of administration." Revised Statutes of Utah 1933, Section 101-4-2.

This statute, the court holds, casts the property of an intestate upon his heirs and hence the administrator has no title to take into the bankruptcy court even could he be given leave to go.

In this view the court finds it is well supported by other decisions. In re Reynolds, D. C. Okla., 21 F Supp.

369 and in re Buxton's Estate, D. C. Ill., 14 F. Supp. 616, construing similar provisions of Oklahoma and Illinois statutes of descent. Both the Reynolds and Buxton cases were decided before General Order 50 (9) was promulgated in January, 1939, and the consent of the state court was not involved, but in each instance a federal court inquired beyond the problem of consent and probed the powers of administrators. Each administrator was found without power to enter into bankruptcy under the applicable state statutes since by state laws of descent the property had devolved upon the intestate's heirs and not his administrator.

Upon this point the Utah court herein quoted from the Buxton case as follows:

> "An administrator takes no title to real estate, either legal or equitable, but it descends to and vests in the heirs at once upon the death of the ancestor." In re Harris' Estate, 105 P. (2d) 461, 463.

Petitioner relies upon Hines vs. Farkas, C. C. A. Ga., 109 F. (2d) 289, in which an opposite view was taken. There to be sure the Fifth Circuit Court of Appeals construed the Georgia probate statutes to contain the enabling provision found to be absent in the Utah Code by the Utah court. The administrator says this is better authority than the Buxton and Reynolds cases,—even better, he says, than the Utah Supreme Court itself herein; and he contends Hines vs. Farkas should control and the Utah court be compelled to amend its views accordingly.

The answer is simple: (1) The Utah court's construction of its own state law is conclusive and is now the governing law in Utah regardless of how other courts might have decided, and (2) the Utah and Georgia Codes are not comparable. The Utah court held they were not:

> "The Georgia statute differs from the Utah Probate Code, and the applicant (in Hines vs. Farkas) was a special administrator whose powers are limited to the preservation of the assets of the estate. In so far as any of the federal cases may be considered, we think the position taken in the cases of In re Reynolds and In re Buxton's estates accord with our statute and our views." (Parentheses added) In re Harris' Estate, 105 P. (2d) 461, 464.

Furthermore, Hines vs. Farkas is not binding anywhere except in the Fifth Circuit. Not even is it binding on the Georgia probate court. The Supreme Court of that state, when the matter comes before it, will view the Georgia State Code according to its own construction with the result that all courts, even the Fifth Circuit Court of Appeals, will henceforth be bound, and notwithstanding that the latter's earlier construction of Georgia state law may have differed. And we suspect just that will happen in Georgia in due time.

The decision herein finds support in another Federal Circuit Court of Appeals (9th). Lemm vs. Northern California National Bank, 93 F. (2d) 709. That court states the law:

> "An administrator is in a real sense an officer of the state court and is subject to its direction and control."

and holds to the postulate implied in the General Order that no federal court may receive an administrator into bankruptcy without leave of the probate court:

> "A proper respect for the jurisdiction of the state court demands a strict adherence to the provisions of the General Order. The bankruptcy court has no authority to entertain the petition of a personal representative of a deceased farmer unless authorization has been obtained by him from his supervisory court." Lemm vs. Northern California National Bank, 93 F. (2d) 709, 711.

This court's requirement by General Order that state court consent be had is no more than to recognize the general law, as stated in Lemm vs. Northern California National Bank, supra, that an administrator is an officer of the state court and subject to its direction and control and that he is incompetent to enter into bankruptcy without his creator's leave. Even without the General Order, such leave would still be necessary, for the activities and powers of any administrator are limited by his supervisory court.

Moreover, aside from judicial considerations involving the power of a state court creature to enter into bankruptcy without leave of the state court, his creator, the

proposition of requiring leave of a state agency before entering bankruptcy, while novel, nevertheless has been found not only in the General Order but in the Bankruptcy Act as well. It existed in Chapter 80 of the Bankruptcy Act held unconstitutional in Ashton vs. Cameron County Water Improvement District No. 1, 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309. It was there provided that local taxing agencies seeking relief in bankruptcy must exhibit the written consent of the state. This moved the Chief Justice and two of the justices of this court to join in Mr. Justice Cardoza's dissent which contended the Act was *not* unconstitutional as an invasion upon state powers since state consent was first required. And in Lindsay-Strathmore Irrigation District vs. Bekins, 304 U. S. 27, 58 S. Ct. 811, prompted the court to concede the constitutionality of the re-enacted law because state consent *had* been given.

Here, petitioner's challenge to the state court judgment is addressed to the reasons the court gave, no more. He does not dispute that court's right to refuse to an administrator on other grounds. *That leave is requisite, he conceded by petitioning the court therefor.* But because the state court assigned as cause for its denial the absence of power in the Utah Code, he disputes the right of that court to deny him leave.

Had denial rested for example simply on improvidence of leave being granted or on improbability of any benefits accruing to the estate; or even on the fact that the heirs on whom descent had cast the property unanimously opposed the venture or that a wise judicial discretion in the particular circumstances commanded the court to refrain from giving leave; or had it rested upon numerous other conceivable grounds the administrator would not and certainly could not have controverted it. The denial of the state court in such case would have been final for certainly the requirement of the General Order implies that a state court will indulge its discretion. But because the state court has assigned the insuperable and now uncontrovertible reason that the State Code itself lies athwart his course, the administrator challenges that court's right to decide.

All reasons encompassed within state law were open to the Utah court to deny him leave. It chose the most for-

midable of all. Any other would have sufficed as well. Petitioner's plaint amount to no more than dissatisfaction with the state court for not having chosen other and perhaps less formidable grounds for its denial.

But the court's decision as we have seen was based upon the State Probate Code. Its judgment is therefore conclusive.

3.

SINCE THE BASIS OF THE STATE COURT'S JUDGMENT WAS THE STATE PROBATE CODE, ITS DECISION IS CONCLUSIVE AND BINDS THIS COURT

Since the Utah court rested its decision on a construction of the State Probate Code, a matter of state law, the determination of the question was exclusively for that court, for questions of state law written and unwritten are for it to resolve and its decision binds all federal courts. Erie Railroad Company vs. Tomkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

Applying the rule, this court even since the decision by the state court herein, has extended the doctrine to the effect that where the highest state court, the final authority thereon, has not expounded the state law, an intermediate appellate state court which has, must be followed. Fidelity Union Trust Company vs. Field, 61 S. Ct. 176. West vs. American Tel. and Tel. Company, 61 S. Ct. 179. Six Companies vs. Joint Highway District No. 13, 61 S. 186, Stoner vs. New York Life Insurance Company, 61 S. Ct. 336.

And even more recently (January 6, 1941) this court has ruled that where, between judgment and appeal in a federal court, the highest state court reverses itself and changes the state law as it stood at the time of trial and judgment, the federal appellate court must follow the state law as changed and reverse the judgment; notwithstanding it conformed to existing state law when it was entered. Vandenbark vs. Owens-Illinois Glass Co., 61 S. Ct. 347.

Discussion of these most recent cases is wholly unnecessary. They are still vivid in the minds of the court. They confirm what respondent bank urged upon the State Supreme Court herein, i. e., that its decision upon the state law, in this case the Probate Code of Utah, would be conclusive on all courts.

And the rule applies in bankruptcy courts as well. Even since Erie Railroad Company vs. Tomkins, supra, it has been projected, and logically so, by this court into bankruptcy, and bankruptcy courts are held to be bound

by state court decisions upon state law. Thompson vs. Magnolia Petroleum Company, 309 U. S. 478, 60 S. Ct. 628. In this recent case the court will recall that a bankruptcy court of Illinois was faced with the problem of construing instruments of conveyance in accordance with Illinois state law. No statutes or decisions of Illinois existed upon the subject. This court recognized the state law in such matters to be supreme. In the opinion by Mr. Justice Black the court referred again to Erie Railroad Company vs. Tomkins for the rule and concluded that since the state court's determination would be conclusive on this and all other federal courts, the matter should be submitted for determination to a state court. It said:

> "Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme." Thompson vs. Magnolia Petroleum Company, 60 S. Ct. 628, 631.

In this case we have the decision of the highest state court of Utah upon a proposition of state law, i.e., that the statutes of that state are barren of authorization to grant leave to administrators to resort to bankruptcy. By the decisions noted that determination of state law is conclusive upon all courts, including the United States Supreme Court. Even it may not coerce that court to revise its judgment in a matter of state law.

Since the state court's judgment was based upon construction of the state law as contained within the Probate Code of Utah, the decision is conclusive and binds this court and must be affirmed.

4.

THE EFFECT OF SUBSECTION (r) BY THIS DECISION

We have not forgotten that Section 75(r) of the Bankruptcy Act includes administrators within its definition of farmers. The decision herein is not at war with that definition. Clearly that section was not designed to *invade* a State Probate Code. Such an attempt would have been idle and would render the statute open to serious constitutional doubts.

All that need be said of this provision is that it and the accompanying provisions of General Order 50(9) are simply enabling acts which (1) make available to administrators and executors the conciliatory benefits of the Act (2) where first they have obtained the authorization of the probate court to apply. Both are simply gestures which beckon administrators to the bankruptcy courts; no more. This was the view of the court in Buxton's Estate, 14 F. Supp. 616 and is sound. That view was adopted by the Utah court herein when it quoted from that case:

> "My conclusion is that while the term 'personal representative' as used in subsection (r) of section 75 may be broad enough to include all executors and administrators of estates of deceased farmers, it does not follow that all executors and administrators may lawfully enter into bankruptcy. It was not the purpose of Congress through this legislation to attempt to add to or remove limits from the power and authority conferred by a state statute upon a personal representative created solely by virtue of such statute through an order of court authorized therein as is an administrator of an estate of a deceased person under the laws of Illinois. Rather it would seem that the sole purpose of Congress was to make sections 74 and 75 of the Bankruptcy Act * * * (11 U. S. C. A., Sections 202, 203), available to those personal representatives of deceased farmers who by statute, will or other creating means are given sufficiently broad powers * * * to take advantage, depending on

the extent of such power, of all or part of the provisions of said sections." In re Harris' Estate, 105 P. (2d) 461, 463.

The state court's decision herein did not challenge the power of Congress to include an administrator in its definition of farmers. That right is conceded. It is simply held that he cannot enter or be given power to enter into bankruptcy under the Utah Code which creates him and which provides the limitations of his powers. If the Utah legislature shall determine to grant him the authority sought, it must provide so by amendment to the State Code. It has met and adjourned now four times while the Act has been in force, each time failing to give its authority. Until it shall, no court, not even the Supreme Court of the United States, may assume to do so for it.

The state court did not challenge or assume to nullify subsection (r). Its provisions are recognized as valid wherever administrators lawfully may obtain authority of the probate court which creates them. Subsection (r) simply cannot apply except where authority has previously been given. In this case the court denied it. That denial is conclusive.

The fact that the particular bankruptcy act may lead to different results in different states is of no consequence. Stellwagen vs. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507.

5.

STATE LAWS OF DESCENT ARE NOT SUSPENDED BY BANKRUPTCY PROCEEDINGS OR THE JURISDICTION OF THE BANKRUPTCY COURT

Petitioner makes much of the fact that his intestate died while the bankruptcy proceedings were pending in federal court and after that court's jurisdiction had attached. The implication of this argument, carried to conclusion, is that the proceedings in the bankruptcy court pending at death actually suspended the state laws of descent and distribution. For if regardless of state statutes of descent, an administrator may seize upon the property of the heirs to whom it otherwise descends by state law and by his own whim substitute the administration of a federal court, admittedly without probate powers, for that of a probate court, and withhold it from the heirs three years under the Frazier-Lemke moratorium, then statutes of descent are certainly suspended. None of the heirs, not one of them, may want the bankruptcy proceedings instituted, or if already instituted, maintained over the property. They may all prefer the probate court, upon whom the state law enjoins that duty, to administer and distribute it. Bankruptcy, as it is to most people, may be distasteful to them. They may desire and have ample means themselves to discharge the debt upon the property and receive it at once at the hands of the probate court,—not three years hence. Yet these heirs, the owners in law and to whom the property has descended by state law, cannot prevent a selfish administrator from resorting to bankruptcy and withholding the property—their own property —from them if he will. This is exactly where petitioner's argument leads.

But the death of the intestate while the Frazier-Lemke proceedings pended should not complicate the case. The state law of descent attached immediately notwithstanding. True, the federal court already had jurisdiction of the property. But this court is not trying the question: What shall the federal bankruptcy court do now? That question is for that court to determine for itself now that the highest court of Utah has determined that the Utah

statutes do not contain authority for administrators and probate courts, both statutory creatures, to resort to bankruptcy.

The State Supreme Court was not trying, *neither is this court reviewing,* the proceedings in the federal bankruptcy court. Let there be no confusion about that. The action of the federal bankruptcy court in ordering those proceedings abated on Mrs. Harris' death likewise is *not* on trial, nor any other action of that court. The judgment involved and sought to be reviewed is far removed from the conflict waged in the bankruptcy court. The judgment is one pronounced in a state court in a state *probate* proceedings. It is *not* one pronounced by a federal court in a *bankruptcy* proceedings. No adjudication by that court in that proceedings is here for review.

The question: What shall the federal bankruptcy court do now? is one for that court to deal with for itself now that the administrator has been forbidden to journey over into its domain and one for direct review by the Tenth Circuit Court of Appeals in the bankruptcy proceedings themselves after the bankruptcy court has made its determination therein. It is not for advance settlement by this court by oblique review in these probate proceedings but one wholly for the bankruptcy court itself.

What to do in a case in which the Almighty has deprived it of a party and the state law and probate court of Utah are unable to provide a new one for it, is now the problem of the bankruptcy court in the bankruptcy proceedings. Quite likely it will be obliged to dismiss, being permanently without a party to the cause. But that is not for this court or the Supreme Court of Utah to decide in these *probate* proceedings, but only for the federal court in the *bankruptcy* proceedings.

Moreover, Section 75 is a Bankruptcy Act for *relief* of debtors. When this debtor died the necessity for her relief was ended. As the court observed in Local Loan Company vs. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A. L. R. 195, the purpose of the Bankruptcy Act has been "again and again emphasized" as being to give the honest debtor:

> "A new opportunity *in life* and a clear field for *future* effort." (Italics added).

This purpose is now lately reaffirmed in respect to Section 75 itself. In the recent case Wright vs. Union Central Life Insurance Company this court again has said:

> "The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness *and permitting him to start afresh.*" (Italics added). Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 514, 58 S. Ct. 1025, 1032.

To the same effect see Williams vs. U. S. Fidelity & G. Co., 236 U. S. 549, 554, 555, 35 S. Ct. 289, 59 L. Ed. 713; Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 582, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106.

When this debtor died the purpose of the Bankruptcy Act, relief of a debtor, was at once fulfilled. Death afforded that relief to her. In the midst of her endeavors in bankruptcy death had brought to a close that "opportunity in *life . . . . for future effort*" which she had hoped the bankruptcy would afford by its *"permitting her to start afresh."* Thenceforward the property and debts were the concern of those upon whom the property devolved by operation of state law. She no longer required relief as a debtor.

Petitioner complains that the federal court wrongfully abated the bankruptcy proceedings at the debtor's death. He says Section 8 of the Act provides "death shall not abate the proceedings." While by Section 8 death itself will not accomplish the abatement the federal court's order in January of 1939 did so, for on that date that court made and entered an order abating the proceedings. (R. 2). If in so doing it be said the court fell into error, that error should and could have been corrected by appeal. This was not done and the order of abatement is therefore binding.

In the very recent case Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773, an order of a bankruptcy court permitting a sheriff's sale was assailed. This court conceded it was error, but it said:

> "In view of the provisions of subsection *o*, it was error for the District Court to permit the sheriff to hold the sale. *But the court had jurisdiction in the*

premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order." (Italics added)

Also:

"(The order) is binding upon respondent since he failed to except to or appeal from it."

But here again as in the prior question: What shall the federal court do now? the problem is one for that court to settle for itself in the bankruptcy proceedings in said court now that the highest court of Utah has determined the Utah statutes are barren of the authority claimed. This court is not reviewing, nor was the State Supreme Court trying in these probate proceedings, the orders of the federal court in the bankruptcy proceedings. Those orders and their effect must be tested there in *bankruptcy;* not here in *probate.*

The death of the debtor while in bankruptcy did not stay the state laws of descent, but the debtor's property was thereby cast accordingly and the determination of what to do now is a bankruptcy question to be resolved in those proceedings by the federal court.

6.

THE ADMINISTRATOR'S PETITION FAILS TO STATE A CAUSE OF ACTION

Aside from questions of the power of the administrator and probate court under the State Code to subject the property to the bankruptcy court, which the Utah Supreme Court held to be clearly lacking, the administrator's petition was wholly insufficient. (R. 1). It follows:

PETITION

> "Comes now Sterling P. Harris, administrator of the above entitled estate, and respectfully shows to the court:
>
> "That at the time of the death of Anna L. Harris, there was pending in the United States District Court for the District of Utah, a proceeding under Section 75 of the Bankruptcy Act; that said proceeding was abated by the death of said Anna L. Harris.
>
> "Your petitioner further shows to the court that unless said proceeding is revived and reinstated, the entire estate of the said deceased is in danger of being lost.
>
> "WHEREFORE, said petitioner prays for an order of this court authorizing him to apply to the United States District Court for an order reviving and reinsating the said debtor relief proceeding."

As the reader will see, the petition wholly fails to state facts sufficient to constitute a cause of action. Only two facts, no more, are stated. These are simply:

(1) That when Mrs. Harris died the Frazier-Lemke proceedings were pending in the federal court; and,

(2) that they were then abated.

The only remaining allegation is not one of *fact* but is purely a *conclusion*:

> "That unless said proceedings are revived and reinstated, the entire estate of the said deceased is in danger of being lost.

The petition is barren of any *facts* showing a reason for the court to grant it. No explanation of how the estate, the heirs and creditors and others concerned would benefit by the bankruptcy proceedings being revived was made therein. No facts were exhibited to show the bankruptcy court could or would better administer the estate than the probate court and that therefore the latter should abdicate and should surrender its jurisdiction to the federal court, or explaining in any way why the probate court should abandon its solemn duty and jurisdiction specially enjoined upon it by state statute to administer to a conclusion the estate in its own court to the exclusion of all others.

Probate courts are quite competent to administer the affairs of deceased debtors. The petition does not state that the administrator is *unable* to effect a composition or extension in the probate court where he belongs, or that he will be able to effect one at all in the bankruptcy court; or that if he could do so in the state court, that he could do *better* in the federal court. For all that appears he could have obtained a composition in the probate court as effectively and advantageously as any he could hope for in the federal court.

Nor is his conclusion "that the estate is in danger of being lost" of any aid in his attempting to state a cause of action for in Utah—

> "Conclusions of law are not to be considered in determining whether a pleading states a cause of action." Gunnison Irr. Co. vs. Peterson, 74 U. 460, 280 P. 715. And see to same effect 1 Bancroft's Code Pl. 90. Id. 10 Yr. Supp. 26.

And since the petition does not state a cause of action it can be challenged at any time and place, even on appeal, and the failure to demur is inconsequential. 1 Bancroft's Code Pl. 157. Id. 10 Yr. Supp. 396. 49 C. J. 820. Id. 839.

Since the petition failed to state a cause of action, the trial court erred and the judgment of reversal by the State Supreme Court was correct. But this again is a state question for the state court. It was fully urged upon it by this

respondent, but due to its view of the case was not decided. Therefore, even were this court of opinion that the State Supreme Court's judgment was erroneous, an absolute reversal would not result, but a proper disposition in such case demands that the cause be remanded for the State Supreme Court to pass on this question of state law which was not determined. This course is mandatory in such cases. It was just recently pursued by this court, it being observed:

> "The judgment will be reversed, but as other points involving questions of *state law* argued here were not passed upon by the Court of Appeals the cause will be remanded to that court for further proceedings not inconsistent with this opinion." (Italics added). West vs. American Tel. and Tel. Company, 61 S. Ct. 179, 185.

The petition clearly states no cause of action.

7.

THE STATE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE ADMINISTRATOR'S PETITION

We have seen that under the State Probate Code from which they derive their powers the administrator and probate court are powerless to enter into bankruptcy and that regardless of that lack of power the administrator's petition failed to constitute a cause of action in these probate proceedings.

But had they such power and had the petition been sufficient, granting the administrator the authority he sought would not be a matter of right but would involve the exercise of the sound discretion of the court.

Certainly the court in such cases would have the duty to appraise the situation and determine two things: (1) Whether any benefit was likely to result to the estate, the heirs and creditors by its allowance, and, if so, (2) whether such benefits were calculated to *exceed* those available in the probate court. If no benefit were to accrue, obviously the petition should be denied. And although certain benefits might appear likely, still the court should not grant the petition unless the benefits were fairly calculated to *exceed* those available in the probate court. For certainly there would be no proper reason in a probate court's resigning in favor of another unless it were assured such other would do a better job than it. No such assurance was made to appear by this petition.

Now the deceased had journeyed in the bankruptcy court for one year (R. 2) without benefit before she died. Her administrator also had had charge of the estate within the probate court for another year thereafter. Altogether they had spent two years in the two courts before the petition was filed in the state probate court herein. Both had been unable to pay the debts of the estate. Notwithstanding both courts had power to authorize a composition with creditors, they had failed to obtain one in either.

After two years of inaction and only five days (R. 2) before sheriff's deed, the administrator set out to effect a composition. He offered no excuse for this previous inac-

tion. Neither did he suggest how a composition might be accomplished. Not even did he say it would be *possible*. Although, if it could be arranged, the probate court had power to approve it, he avoided that court in this regard. The reason, we contended, was obvious. He did not seek a composition at all. What he sought was delay. More delay besides the two years already spent. Apparently he wanted three more years, making five in all to use and withhold the property from the heirs to whom it rightfully belonged and from this creditor who had invested the savings of its depositors in this farm. No solution was offered. Nothing but delay and more delay could result. The situation was hopeless. But notwithstanding, the state trial court granted the petition. In view of all of the circumstances it, in so doing, did not exercise a sound discretion, but its discretion was abused, and its order therefore was erroneous and properly reversed.

That General Order 50(9) concedes the probate court employs discretion in granting or withholding consent to an administrator was recognized herein. Mr. Justice Wolfe discerned at once the presence of that postulate in the Order for in his specially concurring opinion he declared:

> "The 'implications' of General Order 50 (9) involve (s) a recognition by the U. S. Supreme Court, of a *discretion* in the probate court.
>
> "If, therefore, the probate court has discretion we must ask ourselves in this case whether the court *abused* its discretion in permitting the administrator to apply to the federal court to revive and to reinstate the debtor relief proceedings." (R. 20). In re Harris' Estate, 105 P. (2d) 461, 468.

In coming to the case here Judge Wolfe said:

> "The record shows no evidence upon which the court could exercise its discretion. A petition asking to revive was filed. It was noticed for Feb. 10, 1940, arguments heard and an order granting the administrator authorization to apply to the federal court was granted. The court evidently thought the administrator had a right in law to apply and that the order permitting him to do so was a formality. But I cannot think the Supreme Court of the United

States would require under General Order 50 (9) an order by the probate court which in any event it was bound to make. I think in any event the order of the probate court should be set aside." (R. 2). In re Harris' Estate, 105 P. (2d) 461, 468.

The trial court's abuse of discretion was urged upon the State Supreme Court by this respondent but since that court based its decision wholly on the insuperable premise that the Probate Code did not contain the authority claimed, it did not pause to weigh the trial court's action in this regard. Hence were the judgment reversible, and clearly it is not, no outright reversal, but only remand to the State Supreme Court for its decision upon this point, could result.

8.

CONCLUSION

In conclusion, as we said to the Supreme Court of Utah, we say now: Whether a Utah administrator who is a state statutory creature should be empowered to resort to bankruptcy is a question solely for the legislature of that state. It has not ordained that he may. If it be intended that he shall, that body must be the first to say so. Until it does, no court, more especially no federal court, even including this Honorable United States Supreme Court whose rulings firmly acknowledge it and all federal courts bound to the interpretations of state law as expounded by state courts, may assume to legislate for that state body and attempt to introduce the absent power into the Utah statute.

This respondent submits:

1. This appeal is one entirely within a state *probate* proceedings attempting to have reviewed a final judgment made therein by the highest court of that state, the Honorable Supreme Court of Utah. It is not an appeal in a bankruptcy proceedings in a federal court of bankruptcy.

2. The Supreme Court of the State of Utah in these state probate proceedings has construed the probate law of the state, and basing its decision wholly upon its construction of that law, has by its judgment in these proceedings determined that administrators and probate courts of Utah are limited altogether by that Code to the powers therein contained; that the power to resort to bankruptcy is not contained; that by state statutes of descent the property of an intestate is cast upon his heirs, not the administrator, and is not suspended, and that the administrator is powerless, and the probate court bereft of strength to empower him, to enter into bankruptcy.

3. Since the determination of the administrator's powers and those of the state probate court wholly depends upon the State Probate Code which creates them, the construction of that Code, altogether a state question, by the highest court of that state is final and binds all courts even including this Honorable United States Supreme Court herein.

4. Subsection (r) which includes administrators within the definition of farmers is simply an enabling provision, and it and General Order 50(9) are only beckoning gestures which invite those administrators who can become authorized to enter into the bankruptcy court. The former was not intended to invade a State Probate Code; the promulgating of the latter by this Honorable Court conclusively implies as much.

5. State laws of descent are not to be suspended and the course of devolution thereby is not changed by pending bankruptcy proceedings or intervention of bankruptcy jurisdiction; and, What is the federal court to do now? is not this court's concern in this state *probate* proceedings, but the problem of the federal court itself in the *bankruptcy* proceedings now that death has intervened and deprived the debtor of a new "opportunity in life" and of the right to "start afresh" and has itself provided her with relief from the indebtedness which she had sought in bankruptcy.

6. Even were the judgment of the State Supreme Court found to be in error, no absolute reversal but only remand to the State Supreme Court can follow, since that court must then pass upon the question of state law urged and presented before both courts by this respondent but which that court failed to decide: Does the administrator's petition state a cause of action?

7. Likewise in regard to the question also urged and presented by respondent before both courts and also not decided by that court: Did the state trial court abuse its discretion in granting the order which now stands reversed by the judgment of the State Supreme Court?

8. The judgment of the Supreme Court of the State of Utah reversing the state trial court is proper in all respects and must be sustained with costs to this respondent.

Respectfully submitted,

Hadlond P. Thomas
Daniel H. Thomas,
Counsel for Respondent

March 1, 1941

INDEX

Page

1. STATEMENT.

General Order 50(9) 1

11 U. S. C. A. (Sec. 53-100), 1940 Pocket Part, p. 38 1

2. THE BASIS OF THE STATE COURT'S JUDGMENT WAS THE STATE PROBATE CODE.

Ashton vs. Cameron County Water Improvement District No. 1, 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309 8

1 Bancroft's Probate Practice, p. 62, Sec. 33 4

1 Bancroft's Probate Practice, p. 76, Sec. 37 4

Buxton's Estate, In re, 14 F. Supp. 616 6

Cloward's Estate, In re, 95 Utah 453, 82 P. (2d) 336, 339, 119 A. L. R. 123 5

Harris' Estate, In re, 105 P. (2d) 461 ..... 2, 4, 5, 6

Hines vs. Farkas, 109 F. (2d) 289 6

2 Hughes Federal Practice, Jurisdiction and Procedure, Sec. 985 .. 4

Lemm vs. Northern California National Bank, 93 F. (2d) 709, 711 7

Lindsay-Strathmore Irrigation District vs. Bekins, 304 U. S. 27, 58 S. Ct. 811 8

Revised Statutes of Utah 1933, Section 101-4-2 5

Reynolds Estate, In re, 21 F. Supp. 369 5

11 U. S. C. A., Sec. 203(r) 3

3. SINCE THE BASIS OF THE STATE COURT'S JUDGMENT WAS THE STATE PROBATE CODE, ITS DECISION IS CONCLUSIVE AND BINDS THIS COURT.

Erie Railroad Company vs. Tomkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 10

Fidelity Union Trust Company vs. Field, 61 S. Ct. 176 10

Six Companies vs. Joint Highway District No. 13, 61 S. Ct. 186 10

Stoner vs. New York Life Insurance Company, 61 S. Ct. 336 10

Thompson vs. Magnolia Petroleum Company, 309 U. S. 478, 60 S. Ct. 628 11

Vandenbark vs. Owens-Illinois Glass Co., 61 S. Ct. 347 10

West vs. American Tel. and Tel. Company, 61 S. Ct. 179 10

4. THE EFFECT OF SUBSECTION (r) BY THIS DECISION.

Buxton's Estate, In re, 14 F. Supp. 616 12

Harris' Estate, In re, 105 P. (2d) 461 13

11 U. S. C. A., Sections 202, 203 12

Stellwagen vs. Club 245, U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507 .. 13

5. STATE LAWS OF DESCENT ARE NOT SUSPENDED BY BANKRUPTCY PROCEEDINGS OR THE JURISDICTION OF THE BANKRUPTCY COURT.

Local Loan Company vs. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A. L. R. 195.....15

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 582, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106.....16

Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773.....16

Williams vs. U. S. Fidelity & G. Co., 236 U. S. 549, 554, 555, 35 S. Ct. 289, 59 L. Ed. 713.....16

Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 514, 58 S. Ct. 1025, 1032.....16

6. THE ADMINISTRATOR'S PETITION FAILS TO STATE A CAUSE OF ACTION.

1 Bancroft's Code Pl. 90. Id. 10 Yr. Supp. 26.....19

1 Bancroft's Code Pl. 157. Id. 10 Yr. Supp. 396.....19

49 C. J. 820, 839.....19

Gunnison Irr. Co. vs. Peterson, 74 U. 460, 280 P. 715.....19

West vs. American Tel. and Tel. Company, 61 S. Ct. 179, 185....20

7. THE STATE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE ADMINISTRATOR'S PETITION.

Harris' Estate, In re, 105 P. (2d) 461, 468.....22, 23

TABLE OF CASES

Page

Ashton vs. Cameron County Water Improvement District No. 1, 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309..... 8

Buxton's Estate, In re, 14 F. Supp. 616.....6, 12

Cloward's Estate, In re, 95 Utah 453, 82 P. (2d) 336, 119 A. L. R. 123.. 5

Erie Railroad Company vs. Tomkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.....10

Fidelity Union Trust Company vs. Field, 61 S. Ct. 176.....10

Gunnison Irr. Co. vs. Peterson, 74 U. 460, 280 P. 715.....19

Harris' Estate, In re, 105 P. (2d) 461.....2, 4, 5, 6, 13, 22, 23

Hines vs. Farkas, 109 F. (2d) 289..... 6

Lemm vs. Northern California National Bank, 93 F. (2d) 709..... 7

Lindsay-Strathmore Irrigation District vs. Bekins, 304 U. S. 27, 58 S. Ct. 811..... 8

Local Loan Company vs. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A. L. R. 195.....15

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106.....16

Reynolds Estate, In re, 21 F. Supp. 369..... 5

Six Companies vs. Joint Highway District No. 13, 61 S. Ct. 186.....10

Stellwagen vs. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507.....13

Stoner vs. New York Life Insurance Company, 61 S. Ct. 336.....10

Thompson vs. Magnolia Petroleum Company, 309 U. S. 478, 60 S. Ct. 628 11

Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773.....16

Vandenbark vs. Owens-Illinois Glass Co., 61 S. Ct. 347.....10

West vs. American Tel. and Tel. Company, 61 S. Ct. 179.....10, 20

Williams vs. U. S. Fidelity & G. Co., 236 U. S. 549, 35 S. Ct. 289, 59 L. Ed. 713.....16

Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 58 S. Ct. 1025.....16

TABLE OF TEXTS

1 Bancroft's Probate Practice, p. 62, Sec. 33..... 4

1 Bancroft's Probate Practice, p. 76, Sec. 37..... 4

1 Bancroft's Code Pl. 90, Id. 10 Yr. Supp. 26.....19

1 Bancroft's Code Pl. 157, Id. 10 Yr. Supp. 396.....19

49 C. J. 820, 839.....19

2 Hughes Federal Practice, Jurisdiction and Procedure, Sec. 985..... 4

TABLE OF STATUTES AND RULES

General Order 50(9), 11 U. S. C. A. (Sec. 53-100), 1940 Pocket Part, p. 38..... 1

Revised Statutes of Utah 1933, Section 101-4-2..... 5

11 U. S. C. A. (Sec. 53-100), 1940 Pocket Part, p. 38..... 1

11 U. S. C. A., Sections 202, 203.....3, 12